COLLATERAL ESTOPPEL DENIED WHERE MASTER AND SERVANT HELD NOT TO BE IN PRIVITY

Schimke v. Earley
173 Ohio St. 521, 184 N.E.2d 209 (1962)

Plaintiff-administratrix commenced two wrongful death actions to recover for the death of her son who was killed while a passenger in an automobile that was involved in a collision with two trucks. In the first action defendants were the truck owners,[1] and in the second action defendants were the driver-employees of the truck owners.[2] The first action resulted in a directed verdict for the truck owners.[3] In the second action the trial court rendered judgment in favor of the truck drivers on the basis of the defendants' plea of estoppel by judgment.[4] The court of appeals reversed the trial court as to driver Earley, but affirmed the judgments for the truck owners and the other driver.[5] The Supreme Court of Ohio affirmed the court of appeals decision, holding that defendant Earley could not maintain the defense of estoppel by prior judgment. The court premised its decision on Earley's testimony that at the time of the collision, he was not in the employ of the owner whom plaintiff had sued in the prior action.[6] The court held that there was no privity existing between Earley and this employer, and therefore denied Earley the defense of res judicata.[7] As authority for this holding, the majority held to be controlling the decision of *Quinn v. State ex rel. LeRoy*,[8] which defined the basic principles of res judicata and the theory of privity, but did not involve issues of derivative liability that were present in the instant case.

With respect to defendant Shupe, the result of the decision is correct

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[1] Defendants were the Standard Oil Co., alleged by plaintiff to be the employer of Shupe, and the Kopp Clay Co., as the alleged employer of Earley.

[2] Defendants were Shupe as the driver of the Standard Oil truck, and Earley as the driver of the Kopp Clay Co. truck.

[3] The trial court found that while Shupe was admittedly within the scope of his employment at the time of the collision, there was no evidence of negligence on Shupe's part to impute to Standard Oil. With respect to defendant Kopp Clay Co., the court determined that plaintiff had failed to show that Earley was within the scope of his employment.

[4] The trial court's decision was premised on the prior judgments which were rendered in favor of the truck owners.

[5] Schimke v. Earley, Civil No. 37309, Ct. App. Stark Co., Aug. 22, 1961 (Ohio unreported).

[6] In fact, upon extended cross-examination, Earley continued to testify that at the time of the collision he was not working for Kopp Clay Co., but rather for Malvern Flue Lining, Inc., a part owner of the truck. See the court of appeals decision, *supra* note 5, where the cross-examination is set forth.

[7] Schimke v. Earley, 173 Ohio St. 521, 523, 184 N.E.2d 209, 211. The court of appeals decision, *supra* note 5, also premised its reversal of the trial court's directed verdict for Earley on the lack of privity between Earley and Kopp Co.

[8] 118 Ohio St. 48, 160 N.E. 453 (1928).

and in accordance with the overwhelming weight of authority,[9] although the *Restatement of Judgments* is contra.[10] However, as Justice Taft points out in his concurring opinion, the court set a questionable precedent by basing its decision on the existence of privity between master and servant.[11] It is unquestioned that the defense of res judicata or estoppel by prior judgment is based on a theory of privity of interest between two or more persons who are sued in separate actions on the same issues by the same plaintiff.[12] However, a number of jurisdictions have ruled that the privity requirement is not applicable to actions where liability is predicated entirely upon a derivative relationship, such as *respondeat superior*.[13] Earlier Ohio cases, deciding issues similar to those in the instant case, reached proper results without considering the question of privity. In *Fightmaster v. Tauber*,[14] judgment was rendered for the defendant employer in the first action, and the plea of res judicata barred the same plaintiff from bringing an action against the employee. Where judgment was for defendant furnace company as a principal in a prior action, the court in *Melchion v. Burkart*[15] held that the same plaintiff was barred by the prior judgment in a subsequent action against the agent arising out of the same transaction.[16]

The privity theory of the instant case creates a problem when a servant seeks to recover for personal injuries against a defendant who recovered a judgment as plaintiff in a prior action against the master. The servant's action against the plaintiff in the former action would seemingly be barred by a plea of res judicata because master and servant are in privity, according to the theory of the instant case. This result is not proper because the servant would be denied his day in court to assert his independent rights against one who may be liable to him.[17] Even though the theory that a party or his

[9] See the numerous authorities cited in Annot., 23 A.L.R.2d 710 (1952).

[10] Restatement, Judgments §§ 96(2), 99 (1942).

[11] Schimke v. Earley, *supra* note 7, at 523, 184 N.E.2d at 211.

[12] Kinkaid v. Smith, 167 F. Supp. 195, 200 (N.D. Ohio 1958); Mansker v. Dealers Transport Co., 160 Ohio St. 255, 261, 116 N.E.2d 3, 7 (1953); Quinn v. State *ex rel.* LeRoy, *supra* note 8, at 53, 160 N.E. at 455; Clark v. Barnowski, 111 Ohio St. 436, 440, 145 N.E. 760, 761 (1924); Restatement, Judgments § 99 (1942); Comment, 35 Yale L.J. 607 (1926).

[13] King v. Stuart Motor Co., 52 F. Supp. 727 (N.D. Ga. 1943); Spitz v. Bemac Transport Co., 334 Ill. App. 508, 79 N.E.2d 859 (1948); Overstreet v. Thomas, 239 S.W.2d 939 (Ky. Ct. App. 1951); Silva v. Brown, 319 Mass. 466, 66 N.E.2d 939 (1946); Miller v. Simons, 239 Minn. 523, 59 N.W.2d 837 (1953); Thirty Pines, Inc. v. Bersaw, 92 N.H. 69, 24 A.2d 84 (1942); Jones v. Young, 257 App. Div. 563, 14 N.Y.S.2d 84 (1939); Kelly v. Curtiss, 16 N.J. 265, 108 A.2d 431 (1954); Taylor v. Denton Hatchery, Inc., 25 N.C. 689, 111 S.E.2d 864 (1960); Jones v. Valse, 111 Vt. 481, 18 A.2d 179 (1941).

[14] 43 Ohio App. 266, 183 N.E. 116 (1932).

[15] 77 Ohio App. 149, 65 N.E.2d 912 (1945).

[16] See also Mooney v. Central Motor Lines, Inc., 222 F.2d 572 (6th Cir. 1955); Melchion v. Burkhart, 54 Ohio L. Abs. 287, 87 N.E.2d 373 (Ct. App. 1948); Masters v. Brabousky, 27 Ohio N.P. (n.s.) 561 (C.P. 1929).

[17] Pesce v. Brecher, 302 Mass. 211, 19 N.E.2d 36 (1939); Good Health Dairy Products Corp. v. Emery, 275 N.Y. 14, 15, 9 N.E.2d 758, 759 (1937).

privies cannot twice litigate the same issues against an identical opponent is accepted,[18] the servant who brings an action against the party who recovered against the master should not be barred by the prior judgment since the party-plaintiff is not identical. A servant does not have such privity of interest with his master, nor does the master have such an interest that he can sue for his servant's personal injuries. This cause of action is peculiar to the servant, and the master does not have power to bind his servant as the servant's only interest in the prior action against his master was one of the derivative relationship.[19] Courts have generally ruled that both master and servant should be able to maintain separate actions against a defendant for personal injuries and property damages, respectively, arising out of the same transaction.[20]

Applying the privity theory of the instant case, a similarly improper result could occur where an employer sues a defendant for damage to a vehicle which his employee was driving. If the employer prevailed in such an action, and the employee then sued the same defendant for personal injuries arising out of the same occurrence, a privity of interest theory would seemingly permit the employee to assert the prior judgment against the defendant, at least with respect to the issues of defendant's negligence and of plaintiff's contributory negligence. In such an action, plaintiff-employee would be asserting a cause of action personal to himself, and one which was not litigated in the prior and different action of the master.[21]

A third problem created by the decision in the instant case arises in the field of evidence. Ordinarily, a servant's admissions are admissible only as against himself, and not as against his master.[22] If a strict interpretation of privity between master and servant were followed, it would be held that the employee's admissions were those of a party-opponent and therefore admissible in an action against the master.

Courts in other jurisdictions have avoided the problems inherent in a

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[18] That the Ohio courts have accepted the basic principles of res judicata is well settled. See, *e.g.*, Mansker v. Dealers Transport Co., *supra* note 12; Quinn v. State *ex rel.* LeRoy, *supra* note 8.

[19] Pesce v. Brecher, *supra* note 17.

[20] *Ibid.* See also Fightmaster v. Tauber, *supra* note 14; Elder v. New York and Penna. Motor Express, Inc., 284 N.Y. 350, 31 N.E.2d 188 (1940); Gentry v. Farruggia, 132 W. Va. 865, 53 S.E.2d 741 (1949).

[21] This issue was squarely before the court in the *Elder* case, *supra* note 20, where after the plaintiff's master had recovered in a property damage cause of action, plaintiff-servant sued the same defendant for personal injuries. The court held plaintiff could not assert the prior judgment against defendant, at least when plaintiff was not a party to the prior action.

[22] The basic rule of evidence in this respect is that only statements of a party-opponent are admissible. See McCormick, Evidence §§ 239, 243 (1954). The Ohio courts have recognized this evidentiary rule. See, *e.g.*, Voss v. Murrary, 50 Ohio St. 19, 32 N.E. 1112 (1893); Cook v. Slate Co., 36 Ohio St. 135 (1880); Shepson v. Alhambra Lounge & Restaurant, Inc., 64 Ohio L. Abs. 33, 110 N.E.2d 619 (Ct. App. 1952).

privity theory and yet have reached proper results.[23] Most courts have ruled that there is no privity of interest in the res judicata sense between a master and his servant, but nevertheless have permitted estoppel by prior judgment to be asserted defensively by one who was not a party or privy in the prior action. The reasoning for this exception is that it prohibits a plaintiff who has had his day in court from relitigating the same issues by suing the master first, and then suing the servant in a subsequent action.[24] In the development of this exception to the requirement of privity, the technical problem which the courts had to overcome was the lack of mutuality of estoppel in such an exception. A basic precept of res judicata has always been that fair play dictates that one who was not a party to a judgment could not be bound by such judgment. Therefore, the theory of mutuality holds that a nonparty should not benefit from a judgment to which he was not a party.[25] In the typical action against a master for his servant's negligence under a *respondeat superior* theory, the servant is not a party to the action, nor is he in privity with any party. When the same plaintiff sues the servant for the alleged negligence on which the master in a prior action had recovered a judgment on the ground that his servant was not negligent, a strict requirement of mutuality would not permit the servant's plea of estoppel based on the prior judgment. The servant was not a party to the prior action and therefore would not be bound if the judgment had been for plaintiff on the issue of negligence. An overwhelming number of courts have recognized the unfairness of such a strict adherence to the requirement of mutuality in such situations.[26] The unfairness arises because plaintiff has had his day in court; he has chosen the forum and the issues to be litigated. To allow the same plaintiff a second chance to relitigate the same issues is to thwart the very purpose of res judicata, that of bringing litigation to a timely end. To say that plaintiff should not be bound in such circumstances merely because in the second action the party-defendant is not the same as in the prior action is to unduly rely on an antiquated doctrine which serves no justifiable end. The *Restatement*[27] limits the defensive use of the prior judgment against the same plaintiff to situations where the plaintiff's first action is against the servant. This is not in accord with the rule of the majority of courts which permits the prior judgment to be asserted against the same plaintiff whenever the issue of derivative liability has been litigated in the prior action, no matter whether the defendant in the prior action was the party primarily or secondarily liable.[28] Where an attempt is made in the

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23 See cases cited note 13 *supra.* See also Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. App. 2d 807, 122 P.2d 892 (1942), cited and quoted from in the concurring opinion of the instant case.

24 See, *e.g.*, Bernhard v. Bank of America, *supra* note 23, at 812-13, 122 P.2d at 895.

25 See, *e.g.*, Restatement, Judgments § 93 (1942); Comment, "Developments in the Law—Res Judicata," 65 Harv. L. Rev. 818, 862 (1952).

26 See cases cited note 13 *supra;* Bernhard v. Bank of America, *supra* note 23.

27 Restatement, Judgments §§ 96(2), 99 (1942).

28 See cases cited note 13 *supra.*

second action to use the prior judgment affirmatively, instead of defensively, the authorities are not in accord as to its propriety. Some courts are still of the opinion that complete strangers to the prior action should not be able to use affirmatively the prior judgment, especially against the defendant in a former action since such a defendant did not choose the forum. Most courts are not willing to completely do away with the requirement of mutuality and adopt a theory of res judicata premised on the single test of whether a party, plaintiff or defendant, has had his day in court.[29]

In the instant decision, plaintiff's first action was against the two employers; and, since the two driver-employees could not be joined in the same action,[30] they were not parties to that action. When the trial court directed verdicts for the defendant-employers, the reason employee-Shupe as a nonparty was able to assert a unilateral estoppel[31] against plaintiff in the second action against himself and Earley as employees was not that Shupe was in privity with his employer, but that the issue of Shupe's negligence had been fully litigated in the prior action and determined against plaintiff. Assuming that the trial judge also held that Earley was not negligent in the action against his purported employer, it would follow that he should have been able to assert such a finding against plaintiff in the second action even though the court determined that Earley was not in the scope of defendant Kopp Company's employment. This is because plaintiff in the former action chose the forum and had his day in court to litigate the issue of Earley's negligence. Whether Earley was in privity with any party, or within any party's scope

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[29] See, *e.g.*, Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 132-34, 172 Atl. 260, 263-65 (1934), where the court abandoned the requirement of mutuality and limited the requirement of privity to the party *against* whom the collateral estoppel was asserted, *i.e.*, a party who had had his day in court.

[30] They could not be joined because of Ohio's antiquated rule that parties primarily and secondarily liable cannot be joined in the same action. French v. Central Construction Co., 76 Ohio St. 509, 81 N.E. 751 (1907). See also Losito v. Kruse, 136 Ohio St. 183, 24 N.E.2d 705 (1940), where because the Ohio court has maintained its rule against nonjoinder of master and servant, the court took the position that a plaintiff may bring separate actions against a master and servant. This holding seems to imply that a master and servant are not in privity since if they were, a suit against one would be a suit against both. This situation demonstrates even more clearly that the majority opinion in the instant case should have considered varied aspects of collateral estoppel, especially the availability of unilateral estoppel. Perhaps the problems arising from this case are at least in part attributable to Ohio's nonjoinder rule, since if plaintiff had been able to join both employers and both employees in one action, no second action would have been necessary and thus no issues of estoppel by prior judgment would have arisen. This seems to be another reason why Ohio should end its minority rule of nonjoinder of persons derivatively liable. For a criticism of the Ohio rule, see Wills, "Joinder of Master and Servant," 23 Ohio St. L.J. 488 (1962).

[31] The term "unilateral estoppel" is used to more narrowly define the type of collateral estoppel which the majority of courts permits in derivative liability actions; that is, an estoppel which is not mutual as to both the party asserting it and against whom it is asserted.

of employment, would seem to be irrelevant in the second action where Earley was a party-defendant.[32]

The concurring opinion in the instant case is correct in criticizing the majority's reasoning. The proper basis for the court's holding was the principle of unilateral estoppel. With the wealth of case law and commentary existing on the subject of unilateral estoppel by prior judgment,[33] it is difficult to understand why counsel apparently did not develop this subject in argument, and why the majority adopted the unsound privity reasoning. If the issue is again presented, it would be most advisable for the Supreme Court of Ohio to eliminate the privity reasoning of the instant case, and thus avoid the problems which are likely to arise from the incorrect application in this situation.

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[32] Whether the trial court also decided the issue of Earley's negligence is not clear from the record. There is some indication in the court of appeal's opinion that the trial judge did consider this issue, but in view of the court's finding of no agency between Earley and the Kopp Co., the judgment for Kopp should probably be interpreted only as an adjudication that Earley was not its employee since once the nonagency was established, it was unnecessary for the court to rule on Earley's negligence. Moreover, the facts of the collision indicate negligence on Earley's part since he was apparently driving his truck left of the center line of the roadway at the time of the collision. There is no indication in the record that Earley pursued such a theory of unilateral estoppel, either at the trial or on appeal.

[33] See, *e.g.*, cases cited notes 11-14 *supra*. See also Thornton, "Further Comment on Collateral Estoppel," 28 Brooklyn L. Rev. 250 (1962); Collins, "Collateral Estoppel in Favor of Nonparties," 41 Ore. L. Rev. 30 (1961); Moore & Currier, "Mutuality and Conclusiveness of Judgments," 35 Tul. L. Rev. 301 (1961); Weinstein, "Revision of Procedure: Some Problems in Class Actions," 9 Buffalo L. Rev. 433 (1960); Currie, "Mutuality of Collateral Estoppel: Limits of the *Bernhard* Doctrine," 9 Stan. L. Rev. 281 (1957); Polasky, "Collateral Estoppel—Effects of Prior Litigation," 39 Iowa L. Rev. 217 (1954); Comment, "Developments in the Law—Res Judicata," 65 Harv. L. Rev. 818, 861-65 (1952).